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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 23, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, DC 20554

**Re: MM Docket No. 92-254**

Dear Ms. Searcy:

Transmitted herewith on behalf of Gillett Communications of Atlanta, Inc., licensee of WAGA-TV, Atlanta, Georgia, are an original and four (4) copies of its Reply Comments in the above-referenced proceeding.

Should you or the staff have any questions, kindly contact the undersigned.

Sincerely yours,

Neal J. Friedman
Counsel for
Gillett Communications
of Atlanta, Inc.

Enclosures

No. of Copies rec'd 044
List A B C D E

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| | ) | |
| **Petition for Declaratory Ruling** | ) | **MM DOCKET NO. 92-254** |
| **Concerning Section 312(a)(7)** | ) | |
| **of the Communications Act** | ) | |

**TO: The Commission**

**COMMENTS OF GILLETT COMMUNICATIONS OF ATLANTA, INC.**

Vincent A Pepper
Neal J. Friedman

Its Attorneys

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February 23, 1993

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## SUMMARY

The comments of Daniel Becker, who attempted to air a 30-minute graphic abortion program on WAGA-TV, Atlanta, Georgia are shot through with distortions and unsupported conclusions. Without any basis in fact, he suggests that broadcasters would use indecency as a cover to censor unpopular political views. WAGA-TV never sought to censor Becker's program. It only sought to channel it to a time period when there would not be children in the audience. Becker also asserts without any support that there is an inherent broadcast bias against his point of view. WAGA-TV has devoted countless hours to coverage of the abortion controversy and its actions with regard to the Becker program were consistent with its obligation to operate in the public interest.

The National Right to Life Committee ("NRLC") similarly engages in sweeping generalities unsupported by fact. It erroneously states that Congress intended for candidates to have free expression without broadcaster responsibility when, in fact, it was the Supreme Court in the WDAY case that exempted broadcasters from state libel laws when required to air political programming. The NRLC's assertion that a "properly-worded advisory" would warn viewers of graphic material simply ignores the realities of how viewers watch television.

The Media Access Project ("MAP") offers the absurd argument that any harm caused by graphic and indecent political programs would be mitigated by the fact that there would be very few such spots. MAP indulges itself in invoking lofty principles without regard to the real-world impact of graphic and indecent political

programming on children. In this connection, it is highly significant to note that the National Religious Broadcasters, an organization strongly opposed to abortion, refused to permit the showing of a graphic abortion program at its recent national convention.

The American Civil Liberties Union ("ACLU") attempts to confuse and distort the issue by suggesting that an expanded definition of indecency would prevent the showing of classic comedy routines involving the pulling of teeth and childbirth and would have "drastic consequences" for the coverage of AIDS, abortion and fetal tissue research. The ACLU ignores the fact that the Commission has consistently declined to impose sanctions against a licensee for the broadcast of allegedly indecent material within the context of a bona fide news broadcast. The ACLU, while advocating free speech for politicians, declines to address the issue of forced speech imposed on broadcasters. Gillett respectfully suggests that to the extent that Section 315 may force speech, it should not be interpreted to require broadcasters to air political speech that they would not otherwise broadcast.

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| | ) | |
| **Petition for Declaratory Ruling** | ) | **MM DOCKET NO. 92-254** |
| **Concerning Section 312(a)(7)** | ) | |
| **of the Communications Act** | ) | |

**TO: The Commission**

**REPLY COMMENTS OF GILLETT COMMUNICATIONS OF ATLANTA, INC.**

Gillett Communications of Atlanta, Inc. ("Gillett"), licensee of WAGA-TV. Atlanta, Georgia[1/], hereby submits its Reply Comments in the above-captioned proceeding. Gillett supports the comments filed on behalf of Planned Parenthood Federation of America, Louisiana Television Broadcasting Corp., Spokane Television, Inc., Kaye Scholer Fierman Hays & Handler, Turner Broadcasting System, Inc., the National Association of Broadcasters and the Joint Comments of Action for Children's Television, et al. Gillett submits its reply to the comments filed on behalf of Daniel Becker, the National Right to Life Committee, Inc., the Media Access Project and the American Civil Liberties Union.

I. THE BECKER COMMENTS

1. Daniel Becker was one of at least 13 candidates for federal office in 1992 who took advantage of § 312(a)(7) of the Communications Act of 1934, as amended, to force stations to air graphic abortion programs. As Gillett set forth in its initial comments, it obtained declaratory and injunctive relief from the

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1/ On February 19, 1993 an application for assignment of license from Gillett Communications of Atlanta, Inc. to WAGA License, Inc. (no file number assigned) was filed with the Commission.

United States District Court in Atlanta so that WAGA-TV would not be required to air a half-hour graphic abortion program. Gillett Communications of Atlanta, Inc. d/b/a WAGA-TV v. Daniel Becker, Becker for Congress Committee and the Federal Communications Commission, 1:92-CV-2544-RHH, slip opinion, (N.D. Georgia, October 30, 1992) ("WAGA-TV Decision"), appeal docketed, No. 92-9080, October 30, 1992.

2. Beginning at p. 5, Becker presents a series of distortions and conclusory statements that bear no resemblance to reality. He assumes, without any basis in fact, that broadcasters would use indecency as a cover to "censor an unpopular political message."[2/] Id. This assertion is just plain false. Gillett never attempted to censor Becker's message. WAGA-TV aired Becker's first program. His thirty-minute program contained four minutes of material that was, as the WAGA-TV Decision found, legally indecent and, thus, could only be aired in the midnight to 6 A.M. safe harbor. WAGA-TV offered Becker the opportunity to air his message during that time period, but he declined.

3. The proposal Gillett outlined in its initial comments would place the burden squarely on the licensee to demonstrate that the material a candidate sought to air was indecent or otherwise did not meet the station's ordinary standards for good taste. The

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[2/] Throughout the comments of various parties there is the suggestion that Becker is being persecuted for alleged "unpopular" comments. Although Becker lost the election, his position opposing abortion is widely supported. Public opinion surveys show Americans deeply divided on the question of abortion. Indeed, Presidents Ronald Reagan and George Bush campaigned and were elected on platforms opposing abortion on demand.

attempts by Becker and others during the 1992 election campaign to abuse the Communications Act for their own narrow purposes are a new phenomenon. In the more than 60 years of commercial broadcasting in the United States, the WAGA-TV Decision represents the first time a broadcaster has had to seek injunctive relief to prevent the airing of indecent political speech. The proposal Gillett advanced in its initial comments provides the Commission with a fair and efficient mechanism for dealing with indecent and otherwise offensive political speech without unduly infringing on the rights of political speakers.

4. Becker's faulty logic continues at pp. 5-6 where he cites the fact that the first Becker program generated 160 calls of protest to WAGA-TV, all of them blaming the station for airing the program rather than Becker. He claims that Gillett is concerned with "economics" and the perception of its station. WAGA-TV is a business and Gillett is rightly concerned with economics. It also cares a great deal about the public perception of its station. But Becker misses the point entirely. Had WAGA-TV chosen to air Becker's graphic half-hour abortion program it would have earned revenue. Thus, if Gillett were solely concerned with economics, it would have accepted Becker's money and run his program. Instead it adopted the far more costly route of seeking injunctive relief from the court. Why? Because WAGA-TV's management could not in good conscience allow Becker's indecent message to air at an hour when there were large numbers of children in the audience.

5. Finally, Becker at p. 8 jumps to the wholly unwarranted and unsupported conclusion that there is "an inherent broadcaster bias against airing unpopular or highly controversial messages which the broadcaster fears the public will associate with the station." There is simply no basis in fact for this conclusion. The facts will show that broadcasters routinely report on highly controversial issues of community concern. Abortion certainly falls into that category and WAGA-TV has devoted countless hours of air time to reporting fully and fairly on this issue. That WAGA-TV chose not to harm the children in its audience with Becker's indecent political message is not an example of "inherent broadcaster bias." Instead, it demonstrates that WAGA-TV was living up to its obligation to operate in the public interest.

II. NATIONAL RIGHT TO LIFE COMMITTEE COMMENTS

6. The National Right to Life Committee ("NRLC") comments suffer from the sane illogical conclusions as Becker's. NRLC at p. 8 suggests that allowing licensees to make a reasonable good faith judgment that a political program is indecent would "endow that licensee with a blank check to pick and choose candidate messages on the basis of content and shunt disfavored ones to poor broadcasting times." This is an absurdity and is not even close to the Commission's proposal. It reflects again the mindset in some quarters that there is an organized broadcaster bias against them. The more than 12,000 commercial radio and television stations in the United States are not a monolith and could never be. The

specter of some cabal meeting in secret to set the national agenda exists only in the minds of the NRLC and its ilk.[3/]

7. As with Becker, NRLC indulges in making sweeping, conclusory statements without any support. At p. 9 NRLC contends that "it seems likely that Congress intended free expression by the candidate, without the licensee bearing any responsibility." A more careful reading of Section 315 of the Communications Act would reveal that it only prohibits censorship and makes no mention of relieving the licensee of any responsibility for the material aired. It was the Supreme Court that held that a licensee compelled to broadcast a political message was relieved of responsibility from state libel laws. Farmers Educational and Cooperative Union of American v. WDAY, Inc., 360 U.S. 525 (1959). Even the WDAY Court did not absolve broadcasters of responsibility from adhering to 18 U.S.C. 1464, the indecency statute or other federal criminal statutes. NRLC's fanciful argument collapses of its own weight.

8. Similarly, NRLC's argument at p. 10 that a "properly-worded advisory about the upcoming campaign advertisement . . . would suffice to protect the public and the broadcaster" is another example of wishful thinking. It reflects a time, before remote control devices and multi-channel cable systems, when viewers sat down in front of their television sets and rarely changed channels

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[3/] NRLC is confused at p. 8 when it suggests that the FCC cannot give to a licensee that which it is itself prohibited from using. The Commission cannot exercise prior restraint because it is an arm of the government. See U. S. Const., Amend. 1.

from among the three or four then available. Remote control devices and cable system offering dozens of channels have promoted a practice known in the industry as "channel grazing." Many viewers are constantly switching from one channel to another looking for something that will interest them. Such a viewer could inadvertently stumble upon an indecent political message having missed the "properly-worded advisory" that NRLC envisions.

9. NRLC continues its unsupported allegations at p. 12 where it claims that, "Children are regularly exposed to news broadcasts showing dead human bodies and human blood." It then goes on to contend that, "It has also become routine for the national news media when reporting on abortion to show a woman on a table with her feet up in stirrups and an abortionist between her legs performing an abortion." It is a fact that dead bodies and blood do appear on television newscasts from time to time. At WAGA-TV there are strict rules about what can be shown and what cannot. WAGA-TV respects the fact that it is a guest in the viewer's home. WAGA-TV has, when necessary and relevant to the story, used tasteful footage of an abortion. It never has and never would air graphic and indecent footage of the type shown in the Becker program. More to the point, WAGA-TV has never aired footage that generated the level of viewer outrage the first Becker program precipitated.

10. In this connection, it is highly significant to note that the National Religious Broadcasters ("NRB"), an organization not unsympathetic to the anti-abortion movement, rejected a request to

show a nine-minute video, "The Hard Truth." The group of clergy who sought permission to show the video described it as "a succession of pictures that documents the ghastly reality of child killing." The NRB wrote back: "We have carefully reviewed the Anti-Abortion video and agree fully with you and the other who signed the petition that this blight of abortion must stop." (Emphasis in original.) But the NRB refused to permit airing of the video as a part of its convention. "We are of one mind, however, that it would be a mistake to show the video during or after a general session." The exchange of letters is attached hereto as Exhibit 1. Becker and others would force broadcasters to air to an unsuspecting viewing public a video that not even their most sympathetic supporters would permit to be shown at a private meeting.

11. Finally, at p. 13, NRLC proclaims, "What minors are most offended about, however, is the fact that human beings kill baby human beings, not the fact that they see the results. It is abortion, not its depiction, that is deeply offensive." Offensive to whom? To the NRLC and its supporters for sure. But not to the pro-choice side. There is no question that abortion is a complex, emotional and highly controversial issue. The Commission's deliberations are not assisted by the use of unsupported allegations and hyperbole such as that cited above.

12. NRLC leans heavily on the August 21, 1992 staff letter, which was favorable to Becker and dealt with his first program. That commercial was very different from the second program, which

was at issue in the WAGA-TV Decision and which NRLC conveniently ignores. The WAGA-TV Decision found that the second Becker program was in violation of 18 U.S.C. 1464. Slip op. at p. 10. It held that the "graphic depictions and descriptions of female genitalia, the uterus, excreted uterine fluid, dismembered fetal body parts" were "patently offensive according to contemporary community standards." Id. at 11.[4/]

III. THE MEDIA ACCESS PROJECT COMMENTS

13. The Media Access Project's comments ("MAP") rely heavily on WDAY supra. WDAY, however, is inapposite. It concerned the question of what liability a station had if it was required to broadcast allegedly libelous remarks. The WDAY Court granted broadcasters immunity from state libel laws for programming they were required to broadcast pursuant to § 315. It was not concerned with the question of violation of a federal criminal statute (18 U.S.C. 1464) by virtue of the broadcast of indecent political material. WDAY, therefore, cannot be applied to the present circumstances.

14. MAP glosses over the significant issue of harm to children from graphic abortion programs and offers the absurd argument that any harm caused by graphic and indecent political programs would be mitigated by the fact that there would likely be

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[4/] At p. 14 NRLC cites the discussion of the meaning of the word "excrement" in the August 21 letter. That staff letter confused "excrement" with the word "excretory" used in the Commission's definition of indecency and which has a very different dictionary definition. The court in the WAGA-TV Decision correctly differentiated the two words when it found the second Becker program indecent.

very few such political ads and they would be broadcast only during the limited election season. Is MAP saying that traumatizing only a few children is a price worth paying for graphic and indecent political ads? Perhaps so if one looks at it, as MAP apparently has, from the perspective of cold statistics. But if one looks at the issue from the perspective of one parent of one traumatized child there must be another conclusion. It is one thing to sit in an office in Washington, as MAP does, and invoke lofty principles in support of graphic and indecent political advertisements. It is quite another matter to be the parent out in the real world of America who must deal with a child traumatized by something she has seen on television, something that the parent would not let the child see if given a choice. MAP has its priorities backward. The protection of children is a matter of compelling state interest and reasonable time, place and manner restrictions to protect those interests would withstand strict scrutiny. Action for Children's Television v. Federal Communications Commission, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied 112 S. Ct. 1282) ("ACT II"), citing Action for Children's Television v. Federal Communications Commission, 852 F.2d 1332, 1343 (D.C. Cir. 1988) ("ACT I").

IV. THE ACLU COMMENTS

15. The comments of the American Civil Liberties Union ("ACLU") are predictable in that the ACLU has a long and well-deserved reputation for defending the rights of free speech, no matter how abhorrent that speech may be. Gillett does not disagree with that part of the ACLU argument and, were the only issue here

whether Becker's speech should be censored because it is unpopular, Gillett would stand with the ACLU in defending Becker's right to express an unpopular opinion.

16. Beginning at p. 4 of its comments, the ACLU assails the Commission's indecency standard. That discussion is outside the scope of this proceeding. Gillett stated in its initial comments that it took no position with regard to the ongoing indecency proceeding except to note that indecent speech is not permitted on WAGA-TV or any co-owned station. Gillett sought injunctive relief with regard to the second Becker program because it was concerned that its broadcast would expose WAGA-TV to liability for violation of 18 U.S.C. 1464 and because of its duty to the children in its audience.

17. The ACLU argues at p. 5 that an expanded indecency standard could prevent the broadcast of classic comedy routines showing a tooth extraction or childbirth. This is ludicrous and the ACLU knows better than to equate the harmless comedy of "The Three Stooges" or "I Love Lucy" with the graphic scenes depicted in the second Becker program. It is equally absurd to suggest, as the ACLU does, that an expanded definition of indecency would have "drastic consequences" for news coverage of abortion, AIDS and fetal tissue research. The ACLU concludes at p. 6:

> We suggest it would be improper and unconstitutionally chilling to cause news directors to censor their coverage of such events because of the fear that these displays would subject them to sanctions under the Commission's indecency authority.

18. Here ACLU ignores the fact that the Commission has consistently declined to impose sanctions against a licensee for broadcast of allegedly indecent material in the context of bona fide news and public affairs programming. See, e.g. Letter to Peter Branton, FCC 91-27, released January 24, 1991, in which the Commission declined to impose sanctions against National Public Radio for broadcast of wiretap evidence introduced at the trial of gangster John Gotti that was liberally laced with expletives. The Commission held that the broadcast in the context of a bona fide news story was not indecent. The Commissioner further noted that it was reluctant to intervene in the editorial judgments of licensees on how best to present serious public affairs programming to listeners.

19. In the above-cited quote from the ACLU comments, it has unwittingly put its finger on the critical difference between Becker's position, which would force a broadcaster to present material it would not otherwise broadcast and the independent journalistic judgment of a licensee as to how it would present a controversial issue of public importance. Quite frankly, Gillett finds it astonishing that the ACLU could have overlooked the essential issue of forced speech, which is what Becker would have the Commission impose on Gillett with the apparent blessing of the ACLU.

20. Everything that the ACLU says about the importance of political speech is true and Gillett supports that view up to a point. But, when the right of a politician to speak collides with

the right of a broadcaster not to be required to speak, then the rights of the politician must give way.[5/] Gillett finds it inconceivable that the ACLU could ever support forced speech. Surely it must regard the right not to speak as precious as the right to speak. Gillett recognizes that §315 imposes a form of forced speech on broadcasters, which has never been challenged in the courts. This proceeding is not the forum for such a challenge. However, Gillett respectfully suggests that to the extent that §315 may impose forced speech on broadcasters, the obligation constitutionally must be construed very narrowly and the Commission should not apply §315 to force broadcasters to air material, such as the Becker program, that they would not otherwise air.

## V. CONCLUSION

For the forgoing reasons, Gillett Communications of Atlanta, Inc. respectfully requests that the Commission adopt a rule permitting licensees to make reasonable good faith judgments on the acceptability of political advertising, in carrying out their obligation to serve the public interest, that would allow the

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[5/] The leading case on forced speech is Miami Herald v. Tornillo, 418 U.S. 241 (1974), which is discussed in detail in Gillett's initial comments. The Court has never decided the question of whether Tornillo is applicable to broadcasting.

licensee to either reject all or part of a proffered political advertisement or channel it to a daypart in which children would not be likely to be in the audience.

Respectfully Submitted,

**Gillett Communications of Atlanta, Inc.**

By _____
Vincent A Pepper

_____
Neal J. Friedman

Its Attorneys

**PEPPER & CORAZZINI**
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006
(202) 296-0600

February 23, 1993

**EXHIBIT 1**

November 20, 1992

Dr. E. Brandt Gustavson, Executive Director
National Religious Broadcasters
7839 Ashton Avenue
Manassas, VA 22110

Dear Brandt,

Whereas, the abortion holocaust in this country results in the slaughter of 4, 400 children daily, and has taken a total of 29 million lives since 1973;

Whereas, we are called as Christian broadcasters to stand for the truth and speak for those who cannot speak for themselves;

Whereas, our newly elected president has pledged to protect and further the cause of the child killing industry and to allow the bloodshed to continue, and;

Whereas, Christian media has the unique opportunity to bring before the American public the truth about the horror of abortion,

We, the undersigned, hereby respectfully request that NRB Executive Director Dr. E. Brandt Gustavson consider allowing the nine-minute video "The Hard Truth" to be shown to religious broadcasters at a general session of the 1993 Los Angeles convention. This short, powerful video has brought Christians to repentance across the country, and the video was instrumental in moving pastors to unprecedented action in Witchita and Milwaukee. Many of the ministers who viewed the video fell spontaneously to their knees after watching it. The video is not narrated but is merely a succession of pictures that documents the ghastly reality of child killing. The impact that this video could have on thousands of Christian broadcasters is immeasurable. Christian broadcasters hold in their hands the tools necessary to bring together Christians across the nation to end the atrocity of abortion, but first they must be challenged and their hearts must be broken. God can use this short video, The Hard Truth, to do just that. In memory of the 29 million dead, and for the millions more who may die, please consider this proposal. Is there any musician, any speaker who wouldn't sacrifice nine minutes of their time for something this important?

Sincerely in Christ,

| | | |
|---|---|---|
| Dr. D. James Kennedy<br>Coral Ridge Ministries | Dr. Tim LaHuye<br>Family Life Ministries | Frank Schaeffer<br>The Christian Activist |
| George Grant<br>Legacy Communications | Dr. Beverly LaHuye<br>Concerned Women For America | |
| Rev. Don Wildmon<br>American Family Association | Judie Brown<br>American Life League | |
| Dave Breese<br>Christian Destiny Ministries | Joseph M. Scheidler<br>Pro-Life Action League | |
| Don Hawkins<br>Life Perspectives | Vic Eliason, Vice-President<br>VCY America Radio Network | |

# NRB

National Religious Broadcasters

*Serving Since 1944*

FAX TRANSMISSION

December 30, 1992

TO: Vic Eliason, WVCY, Milwaukee FAX #414-935-3015

FROM: Brandt Gustavson FAX #703-330-7100

We have carefully reviewed the Anti-Abortion video and agree fully with you and the others who signed the petition that this blight of abortion **must** stop. It is a gross sin plaguing our nation.

We are of one mind, however, that it would be a mistake to show the video during or after a general session. We are suggesting that NRB provide at its expense a room for the video showing. Further, I will announce in appropriate general sessions the fact of the showing, the time and room number.

You will need to be responsible for the equipment for the showing. You should work out with Mike Glenn the details as well as the showing time.

Vic, I love your zeal in standing for what's right and wrong. You are a blessing to the nation. I trust that our plan will work out well in getting this message to our attendees.

EBG:ad

cc: Michael Glenn

E. Brandt Gustavson, L.L.D., *Executive Director*

7839 Ashton Avenue ■ Manassas ■ Virginia 22110 ■ Phone (703)330-7000 ■ Fax (703)330-7100

# *CROSSTALK* Radio Talkshow

3434 West Kilbourn Avenue Milwaukee, Wisconsin 53208
1-800-729-9829


January 28, 1993

Dear Christian Broadcaster,

January 22, 1993 marked the twentieth anniversary of the terrible Roe V. Wade decision. Thirty million children are dead, and the killing continues.

Believing that now, more than ever, Christian broadcasters must take a decisive stand on the sanctity of human life, the attached letter was sent to Dr. E. Brandt Gustavson, Executive Director of National Religious Broadcasters, requesting that the video HARD TRUTH be shown during a general session of the 1993 convention in Los Angeles. HARD TRUTH is unequaled in its impact because of its brevity and graphic display of the broken bodies of children who have been slaughtered in our land. In Milwaukee, we have seen God use this video to break the hearts of complacent Christians and to compel them to act on behalf of the pre-born. As of the writing of this letter, our request to show this video in a general session has been denied. NRB suggested that the video be shown in a side room. (Please see enclosed related correspondence.)

Because of NRB's refusal to show HARD TRUTH in a general session, listeners to our national talk show, CROSSTALK, raised eight thousand dollars in forty minutes so that a copy of this video could be delivered to you and as many broadcasters as possible.

Enclosed please find a copy of HARD TRUTH. If each broadcaster receiving this video would sponsor special viewings for pastors and Christian leaders in your area, I believe that the Church could come alive in defending the pre-born.

It is our prayer that God will use this video in a mighty way to wake up the church and put an end to child-killing once and for all.

For the Children,

Vic Eliason, Host
CROSSTALK Radio Talkshow

**CERTIFICATE OF SERVICE**

I, Susan A. Burk, a secretary with the law firm of Pepper & Corazzini, hereby certify that a true and correct copy of the foregoing Reply Comments was served by U.S. mail, first-class, postage prepaid on the 23rd day of February, 1993 on the following individuals:

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